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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Oakville, Raymond and
South Bend, Washington)

) MM Docket No. 00-41
)
) RM-9369
)
)
)

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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OFFICE OF THE SECRETARY

COMMENTS IN OPPOSITION
TO
PROPOSED RULEMAKING

Respectfully submitted,

3 CITIES, INC.

by: Robert J. Buenzle

Its Counsel

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May 3, 2000

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S U M M A R Y

On March 10, 2000, the Commission issued a Notice of Proposed Rulemaking in response to a Petition filed by Jodesha Broadcasting, Inc.. 3 Cities, Inc, licensee of KXXO(FM) in Olympia, Washington, submits here that the proposal is fatally flawed, requests an allotment to a designated community which would not and could not be recognized as a "community" for allotment purposes by the Commission under long-standing Commission policy, and that the proposal is actually an attempt by Jodesha to vacate the only service in a small town in favor of relocation as a new additional reception service to Olympia, Washington in contravention of Section 307(b) of the Communications Act and cases such as Huntington and Tuck decided thereunder. It is also pointed out that the population figure for the requested allotment is not correct, inflated by 35%, that facts required such as gain/loss studies and population numbers were not submitted and that no commitment was submitted to apply or build a station in South Bend on a requested allotment as required. In view of the numerous and fatal substantive flaws in the Petition, 3 Cities moves that the Petition be dismissed or denied.

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**COMMENTS IN OPPOSITION
TO
PROPOSED RULEMAKING**

On March 10, 2000, the Commission released a Notice of Proposed Rulemaking (NPR) in the above-captioned proceeding suggesting changes in the Allocation Table proposed by Jodesha Broadcasting, Inc. ("Jodesha") licensee of KSWW(FM), Raymond, Washington, and KJET(FM) (formerly KFMY(FM)), South Bend, Washington. Submitted herewith by counsel on behalf of 3 Cities, Inc. ("3 Cities"), licensee of KXXO(FM), Olympia, Washington, is its Comments in Opposition to that proposed rulemaking. In support whereof, the following is submitted:

I. Preliminary Statement

A review of the Petition filed by Jodesha reveals a scheme that resembles a house of cards more than a rulemaking, and one that is deficient on its face in several areas that are essential in making a positive public interest determination of the proposal. On an overall basis, the proposal appears to be the

final step in a multi-step attempt by Jodesha to move an allocation from its existing small town of Raymond (population 2901) to a relocation approximately 25 miles closer to Olympia (population described by U.S. census as central city 33,840 and Olympia Division County as 106,569, see Attachment to Engineering Statement) as a de facto new station for that major city and capital city of the state of Washington. The designated new "community" for this relocation to Olympia is listed as "Oakville", an area comprised of a group of 493 persons 1/ claimed to be a community by Jodesha but one which is not even listed as a community or place in the current Rand McNally Road Atlas, a spot in the road whose only purpose or claim to fame is its juxtaposition to Olympia.

The past history of the existing Raymond station is illustrative and predictive of the fast and loose way that this petitioner has used his existing license for that station, and how it is trying to use it here. As admitted in its own Petition, Jodesha currently is licensed as a Class A station in Raymond. But in 1990 it asked for and received FCC authorization to upgrade that facility to a Class C3 station. Having received that authorization, however, the new upgraded station was never built. Instead, Jodesha filed another application, this time asking

1/ Note that this figure of "493 persons" is taken directly from the current U.S. Census Gazetteer which is reproduced in the attached Engineering Statement. It is at odds with the figure of 665 persons supplied by Jodesha at footnote 1 of its Petition and allegedly from the U. S. Census. We do not know where they got their number, which was inflated by 35% over the correct figure, only that our figure of 493 is correct and the one submitted by Jodesha is not correct.

authority to convert the station to a C2 Class. That was never implemented but was instead amended to then request modification to a Class C1 station, all in Raymond. The latest and most recent of these four proposed and never implemented "I've got an even better idea" changes in the facilities of KSWW is the instant proposal to now take the station out of Raymond altogether and move it approximately 25 miles closer to Olympia to the essentially nonexistent new "community " of Oakville.

This approach to the Commission processes is wasteful of the Commission's limited time and financial resources and for that reason alone should not be countenanced or rewarded any further. Beyond that however, the Petition as submitted suffers several fatal and non-repairable defects which should render the proposal void ab initio, all of which will be detailed below.

II. The Proposed "Community" of Oakville is Not a "Community" as Defined and Recognized by the Commission.

At the outset, it should be recognized that as the "petitioner" here, the burden was upon Jodesha to submit all information necessary to support all elements of its proposal. Jodesha failed miserably in its responsibility in several areas, the first of which being failure to provide sufficient facts to support a determination that Oakville was a community for FCC allocation purposes. The extent of its showing on this most essential point consisted of a one sentence footnote on page one that simply claimed (wrongly, see footnote 1) that Oakville had a 1990 census population of 665, a local fire and police

department, a public library and a municipal court "...and thus, qualifies as a community for allotment purposes".

This naked statement may be many things, the words "presumptuous" and "arrogant" coming first to mind, but one thing it is not is "sufficient". There is no case anywhere and none cited by Jodesha that stands for the proposition that the elements cited by Jodesha define a community for FCC allotment purposes. First of all, as noted previously, the town of Oakville is not even listed as existing at all in the Rand McNally Road Atlas, a common starting place in trying to define a community. Secondly, there are obvious questions as to what kind of community of 665 consists of a fire department, police department, library and courthouse.

That would seem to virtually consume all the inhabitants of the city in those "city functions" requiring all the people to sit around waiting for a fire to break out, to arrest someone or to try them in court (of course, if none of these events occur, they could all go the Public Library for a book to read but this then would exhaust the listed town facilities). That then would leave no one left to operate any businesses, run any school systems, operate any post offices, provide any recreational facilities, or do any of the other myriad things that actually define a real independent functioning community.

The fact is that the 'one sentence' footnote provided by Jodesha, even if it were true, is patently and conclusively legally insufficient to define a community for FCC allocation

purposes and must be rejected as such. This has been made crystal clear by the Commission as recently as the Commission's Decision in Pleasant Dale, Nebraska, DA 99-2246, released October 22, 1999, where a similar inflated claim of "community" was also firmly rejected. In that case there was also an incorporated area, with a claimed population of 253 people that claimed it had a mayor, town council post office, zip code, and several retail businesses, including a general store. This was held to be an insufficient showing in which the Commission said the following:

[the city claim is rejected since] it provides no information as to the businesses which it says exist to demonstrate that they are intended to serve the needs of Pleasant Dale as opposed to other areas. This is a critical deficiency because in past cases we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question [citing Gretna, Marianna, Quincy and Tallahassee, Florida, 6 FCC Rcd 633 (1991)]. ... while petitioner states that Pleasant Dale has a mayor and city council, it provides no information as to what municipal services this local government may provide to the residents, or the names or addresses of the businesses which it states exist. In addition [it] has not provided the names or addresses of any social or civic organizations, schools, libraries or other governmental services which are located within Pleasant Dale. (emphasis supplied).

In the case of Jodesha, the situation is even worse than in the Pleasant Dale case. Jodesha has not only not supplied the names and addresses of businesses or the nexus of political, social, and commercial organizations in the community in question, but has failed to even allege that such business, political, social, or commercial organizations exist at all. As indicated, this failure to provide the basic information

essential to determination of Oakville as a community for FCC allocation purposes was the burden of Jodesha, and constitutes a fatal defect which by itself, as in the Pleasant Dale case, totally invalidates the Jodesha rulemaking proposal, requiring that it be dismissed or denied. 2/

III. Other Defects in the Jodesha Proposal.

1. Failure to Provide Information of Population Gain/Loss Study

Despite the fact that Jodesha proposes moving a proposed Class C1 facility out of Raymond, to be replaced with a Class C2 facility to be taken from South Bend, it provided no information at all as to areas that would predictably gain or lose service in such a change or in the populations that would be included in such gain/loss areas as required. See e.g. Atlantic and Glenwood, Iowa 10 FCC Rcd 8074 (1995). Nor did it include any showing that there would be at least five reception services remaining in any loss area as required. See e.g. Ravenwood and Elizabeth, West Virginia, 10 FCC Rcd 3181 (1995). This again constitutes a substantive and fatal omission by the petitioner of information essential to the Commission in considering the petitioner's request.

2/ Since the move of KFMV(FM) from South Bend to Raymond is dependent upon KSWW(FM) vacating Raymond for Oakville, it too must be dismissed upon the determination that KSWW(FM) must remain in as it is in Raymond. Similarly for the proposed new allocation at South Bend, contingent upon KFMV(FM) vacating South Bend for Raymond. As previously indicated, the entire Jodesha rulemaking proposal is a "house of cards" with several defective houses.

2. Failure to Provide a Showing as Required
by Tuck and Huntington.

In its proposal Jodesha suggests taking a Class C1 channel from its present location of Raymond, population almost 3,000 (2,901 by the 1990 Census) moving it approximately 25 miles closer to the major urban area of Olympia to a location defined by Jodesha as Oakville, an area not qualified as a community for FCC allotment purposes (see above) with a U.S. Census population of 493 persons, whose only claim to fame being that it is located approximately 20 miles from downtown Olympia. Attached hereto is an Engineering Study which includes a map graphically depicting the predicted coverage of Olympia by the new facility proposed to be licensed to "Oakville". The penetration of that service contour over Olympia is such that a presumption is raised that the proposal is really not for a new transmission service for Oakville, but for an additional reception service for Olympia. In such a case, it is required for the petitioner to submit a showing to rebut that presumption as required by Huntington Broadcasting Co v. FCC, 192 F 2d 33, 35 (D.C. Cir. 1951) and the line of cases that followed it, most notably Faye and Richard Tuck, 3 FCC Rcd 5374 (1988) 3/

3/ Oddly enough, the Commission in the NPR recognized the Tuck requirement in such cases but then suggested that "none of the proposed allotments are in or near and urbanized area" so such a showing was "not applicable". Given the clear and indisputable proximity to the Olympia urbanized area and the predicted coverage of that area by the proposed relocation, it appears that the Commission was clearly wrong on this determination and a Tuck study was necessary.

Olympia is the capital city of the State of Washington with a 1990 population of 33,840 which after more than ten years of intervening growth may now be reasonably estimated in excess of 50,000. In addition, Olympia has a virtual "twin city" in Tacoma whose city limits lie just about ten miles north of the city limits of Olympia. Tacoma itself had a 1990 population of 176,664. The entire area is included in a single ADI for marketing and sales purposes.

In such a situation it is incumbent for anyone proposing a new service to a community (assuming arguendo that it was in fact a recognizable community) near such an urbanized area and providing city grade service to such an urbanized area, to provide factual evidence to rebut the natural presumption that the station in question is really meant to be and should be considered as an additional service to that urbanized major city area. Evidence should have been submitted showing the relative size, location and population of the specified "community " and the central city of the urbanized area, along with other evidence relating to the interdependence or claimed independence of the community to the central city including proximity, signal population coverage and relevant advertising market. To the extent that Jodesha failed to submit such as showing in this case it must be found against the petitioner, with its proposal for a new transmission service for the alleged "community" of Oakville, recognized as simply the proposal for a new additional reception service for the the major city of Olympia, to be added to the plethora of stations already located there. As stated in the

Commission's Amendment of Rules Re Authorizations To Specify a New Community of License, 5 FCC Rcd 7094 (1990) at f.n. 14:

If a suburban station could provide service to the metropolis, and if the suburban community is relatively small, is within the Urbanized Area, and exhibits a high degree of interdependence with the metropolis, we are generally disinclined to grant a first local service preference to the suburban community proposal.

As such, again arguendo, if the Oakville proposal were considered at all, it would be a comparison of the operation off KSWW(FM) in Raymond as its only station with the proposed removal and operation of KSWW(FM) as a new additional reception service to be added to Olympia, Washington. Under the Commission's normal priorities in such cases (See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982)), the existing allocation of KSSW(FM) to Raymond would be preferred as a First local service (priority 2) (and perhaps also a first aural service (priority 1) although Jodesha provided no information on that), clearly preferable to reallocation to serve Olympia as a new additional reception service (priority 4). In any case, the proposal to relocate KSWW(FM) from Raymond to "Oakville" would fail.

3. The Proposal to Take the Existing Station From South Bend is Contrary to The Public Interest and Also Legally Deficient.

In its proposal Jodesha suggests removing KJET(FM) (formerly KFMY(FM)) operating on channel 289C2, the only station licensed to South Bend, from that community and "replacing " that removed

station with a new allocation of channel 300A. 4/ Taken in its best light, the proposed removal of that operating Class C2 station and "replacing" it with a new proposed Class A allocation that does not in any way qualify as an "equivalent substitution" for the community of South Bend. As stated by the Commission in its Amendment of Rules to Specify a New Community of License (supra) at paragraph 19,

The public has a legitimate expectation that existing service will continue and this expectation is a factor we must weigh independently against the the service benefits that may result from reallocating of a channel from one community to another , regardless of whether the service removed constitutes a transmission service, a reception service, or bot. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service. We specifically wish to clarify that replacement of an operating station with a vacant allotment...although a factor to be considered in favor of the proposal, does not adequately cure the disruption to "existing service" occasioned by removal of an operating station. (emphasis supplied)

See also Albion, Lincoln, and Columbus, Nebraska 8 FCC Rcd 2876 (1993). Beyond that, there is the further defect in the South Bend proposal that the petitioner failed to include a statement of commitment to apply for, build, and operate a new station in South Bend on the requested new channel. This omission is all the more obvious and since Jodesha made a point of including such a commitment as it related to the changes for the existing stations to Oakville and Raymond. The omission of such a commitment for the requested new "replacement" unbuilt allocation

4/ Although Jodesha refers to itself in its petition as a permittee, it has since constructed and licensed the station in South Bend (BLH-990804KC) and it is presently an operating station in that community.

at South Bend is an obvious, patent, and fatal defect as it relates to the South Bend proposal and renders that proposal of a new channel allocation to South Bend a nullity. See e.g. the Commission's Decision in LLano and Marble Falls, Texas, 12 FCC Rcd 6809 (1997).

IV. Conclusion

In its petition, Jodesha has included errors of fact, failed to submit factual data necessary and required for the FCC to make positive determinations essential to processing any such proposal, and failed to include all necessary commitments to apply and construct on requested allocations, most notably the one for South Bend. The Commission expects proposals to be accurate and correct when filed (Broken Arrow and Bixby, Oklahoma and Coffeenville, Kansas, 3 FCC Rcd 6507, 6511 n.2; recon den. 4 FCC Rcd 6981 (1989) and this one did not even come close. Specific defects include the following:

1. It has proposed an allotment to a "community" which on its face does not meet the Commission's long-established criteria for determining "community" status for allotment purposes. Furthermore, in referring to that "community" Jodesha submitted alleged census population figures to the Commission that were inflated 34% beyond the true U.S. census figure.
2. It utterly failed to Supply required Gain/Loss Information as to the areas that would gain and lose service under their

proposal as well as what existing service would remain to serve those areas.

3. Notwithstanding the proximity of its specified new "community" with a population of 493 to the Urbanized area of Olympia (population described by the U.S. census as 33,840 in central city and 106,569 in Olympia Division County), it utterly failed to provide any information at all on the suburban community issue as set forth in Huntington, Tuck, and the FCC's Orders Issued relative to Requests to Specify a New Community of License.

4. It proposed to remove the only station licensed to South Bend, an operating Class C2 station, proposing then to "replace" that station with a new Class A allocation, a procedure not recognized or accepted by the Commission as an acceptable "replacement" to such lost service.

5. It making its suggestion for a new allotment to South Bend, it failed to submit any statement of commitment that it would file an application and build and operate a new station there if the channel were in fact allotted, another fatal defect in the Jodesha proposal.

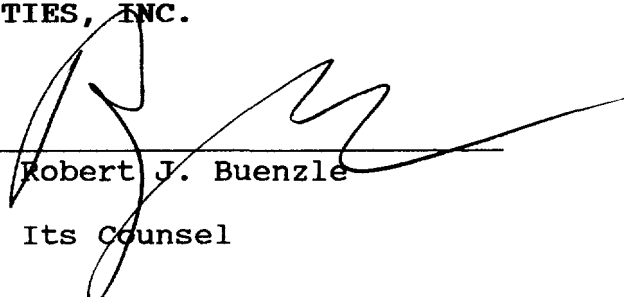
With the enormity of deficiencies in this proposal we submit that it is inherently and massively defective and should have been seen as such upon a first reading, dead on arrival. Such being the case, we submit that issuance of an NPR responsive to this proposal was itself a mistake and that it should go no further. For the reasons stated herein and in the accompanying

Engineering Statement, the Jodesha proposal should be dismissed or denied as a patently and irretrievably defective proposal.

Respectfully submitted,

3 CITIES, INC.

by



Robert J. Buenzle

Its Counsel

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May 3, 2000

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Engineering Statement
Oakville, Raymond, and South Bend, Washington
MM Docket 00-41
May 2000

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F. W. Hannel, PE
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STATE OF ILLINOIS)
)
COUNTY OF PEORIA) SS:

F. W. Hannel, after being duly sworn upon oath,
deposes and states:

He is a registered Professional Engineer, by examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding Bachelor of Science and Master of Science degrees, both in Electrical Engineering;

His qualifications are a matter of public record and have been accepted in prior filings and appearances requiring scrutiny of his professional qualifications;

The attached Engineering Report was prepared by him personally or under his supervision and direction and;

The facts stated herein are true, correct, and complete to the best of his knowledge and belief.

F. W. Hannel

May 1, 2000

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Engineering Statement
Oakville, Raymond, and South Bend, Washington
MM Docket 00-41
May 2000

This firm has been retained by 3 Cities, Inc., ("3CI") licensee of Radio Station KXXO(FM), Olympia, Washington to prepare this engineering statement in the above captioned proceeding. The Commission issued a Notice of Proposed Rulemaking on March 10, 2000 which proposed channel substitutions in Oakville, Raymond and South Bend, Washington. Specifically, the petition filed by Jodesha Broadcasting, Inc., ("JBI"), licensee of Radio Station KSWW(FM), Raymond, Washington, and Radio Station KFMY(FM), South Bend, Washington, seeks the reallocation of both its existing stations to new communities.

Initially it should be noted that the at present JDI provides service to Raymond, Washington with Radio Station KSWW(FM), a Class C1 allotment and South Bend, Washington, with Radio Station KFMY(FM), a Class C2 allotment. In its proposal, JDI fails to note that, in fact, it is proposing to downgrade the allotment at Raymond from a Class C1 allotment to a Class C2 allotment, and also proposes to remove the only aural service from South Bend and replace the South Bend service with a the vacant allotment of FM Channel 300A.¹ In addition to leaving South Bend, Washington without an operating aural service, JDI fails to demonstrate how the public interest is served by removing the Class C1 facility at Raymond to the much smaller community of Oakville, Washington.

Attached as Exhibit E-1 is the US Bureau of Census population for each of the communities involved in the proposed channel substitution. South Bend, population

¹ While JDI offers no justification for the downgraded allotments and the resulting public interest benefits, (as there are none), it also fails to document what public interest is served by removing the only aural service at South Bend, Washington and replacing it with a vacant channel. Significantly, JDI makes no commitment to apply for or build the vacant allotment it has requested for South Bend.

1551 persons, would be left without an operating aural service. Raymond, population 2901 persons, would be left with a downgraded facility and the Raymond Class C1 station would be moved to Oakville, Washington, which has a population of 493 persons.² The net impact of the realignment of facilities as proposed by JBI is obvious. Raymond loses a C1 facility, South Bend loses its only aural service and a much smaller village, Oakville, receives a local service.³

In essence JBI is moving FM Channel 249C1 from Raymond, Washington to Oakville, Washington and all other changes are ancillary to the primary move of FM Channel 249C1. From the data submitted by JBI, the total population gained appears to be from this channel move alone⁴.

At the present time FM Channel 249C1 is allotted to Raymond, Washington at co-ordinates N46-41 44, W123-46-17 and JBI seeks to relocate that facility to the smaller village of Oakville at reference co-ordinates N46-57-14, W123-29-21. This relocation is move of 22 miles northeast of the present allotment. Attached as Exhibit E-2 is a map which shows the estimated 1 mv/m contour for the relocated facility and from this map the objective of the move is clear. The site is 22 miles closer to Olympia, Washington, a much larger community which JBI is trying to cover with the Raymondville facility.

Attached as Exhibit E-3 is a US Census population distribution for Olympia and its environs. From this population data and the fact that the proposed move by JBI is 20 miles closer to Olympia, the real reason for the channel change from a community of 2901 persons to a village of 493 persons becomes obvious. JBI seeks coverage of Olympia and its environs.

² JBI, in its Petition for Rulemaking has a 1990 US Census population for Oakville, Washington of 665 persons. The JBI population is 35 percent greater than the actual 1990 STF1 tape census data. The reason for the discrepancy is unknown to 3CI, however, 3CI has attached the actual census data to this report.

³ The South Bend allotment on FM Channel 300A would be a downgraded service from the existing Class C2 station, however, the real situation is worse. Nowhere has anyone expressed any commitment whatsoever to apply for, much less construct and build, the replacement facility at South Bend. The apparent inequity here is that a community of 493 persons, (Oakville) gets a Class C1 allotment and a community of 1551 persons, (South Bend), is deprived of its only operating local station. It is not clear to 3CI how the public interest is advanced by this realignment of the Table of Allotments.

⁴ The population data submitted by JBI is somewhat misleading. For example, the population covered by the proposed allotment of Channel 300A at South Bend is included in the population counts as a positive factor, when, in fact, the population actually receiving a signal from the proposed new Class A facility at South Bend is significantly less than the population receiving a signal from the present South Bend facility.

In view of the foregoing, 3CI submits that the channel realignment requested by JBI is not in the public interest and that the Commission should not grant the rulemaking proposal contained in MM Docket 00-41.

3 Cities, Inc.
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Engineering Statement
Oakville, Raymond, and South Bend, Washington
MM Docket 00-41
May 2000

Exhibit E-1

1990 US Census Data
Database: C90STF1A
Summary Level: State--Place

South Bend city: FIPS.STATE=53, FIPS.PLACE90=65625
PERSONS
Universe: Persons
Total.....1551

1990 US Census Data
Database: C90STF1A
Summary Level: State--Place

Raymond city: FIPS.STATE=53, FIPS.PLACE90=57430
PERSONS
Universe: Persons
Total.....2901

1990 US Census Data
Database: C90STF1A
Summary Level: State--Place

Oakville city: FIPS.STATE=53, FIPS.PLACE90=50430
PERSONS
Universe: Persons
Total.....493

3 Cities, Inc.
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 Olympia, WA 98507

 Engineering Statement
 Oakville, Raymond, and South Bend, Washington
 MM Docket 00-41
 May 2000

 Exhibit E-3

1990 US Census Data
 Database: C90STF1A
 Summary Level: State--County--County Subdivision

Olympia West Division county: FIPS.STATE=53, FIPS.COUNTY90=067,
 FIPS.COUSUB90=92384

PERSONS

Universe: Persons

Total.....15003

1990 US Census Data
 Database: C90STF1A
 Summary Level: State--County--County Subdivision

Olympia Division county: FIPS.STATE=53, FIPS.COUNTY90=067, FIPS.COUSUB90=92352

PERSONS

Universe: Persons

Total.....106569

1990 US Census Data
 Database: C90STF1A
 Summary Level: State--Place

Olympia city: FIPS.STATE=53, FIPS.PLACE90=51300

PERSONS

Universe: Persons

Total.....33840

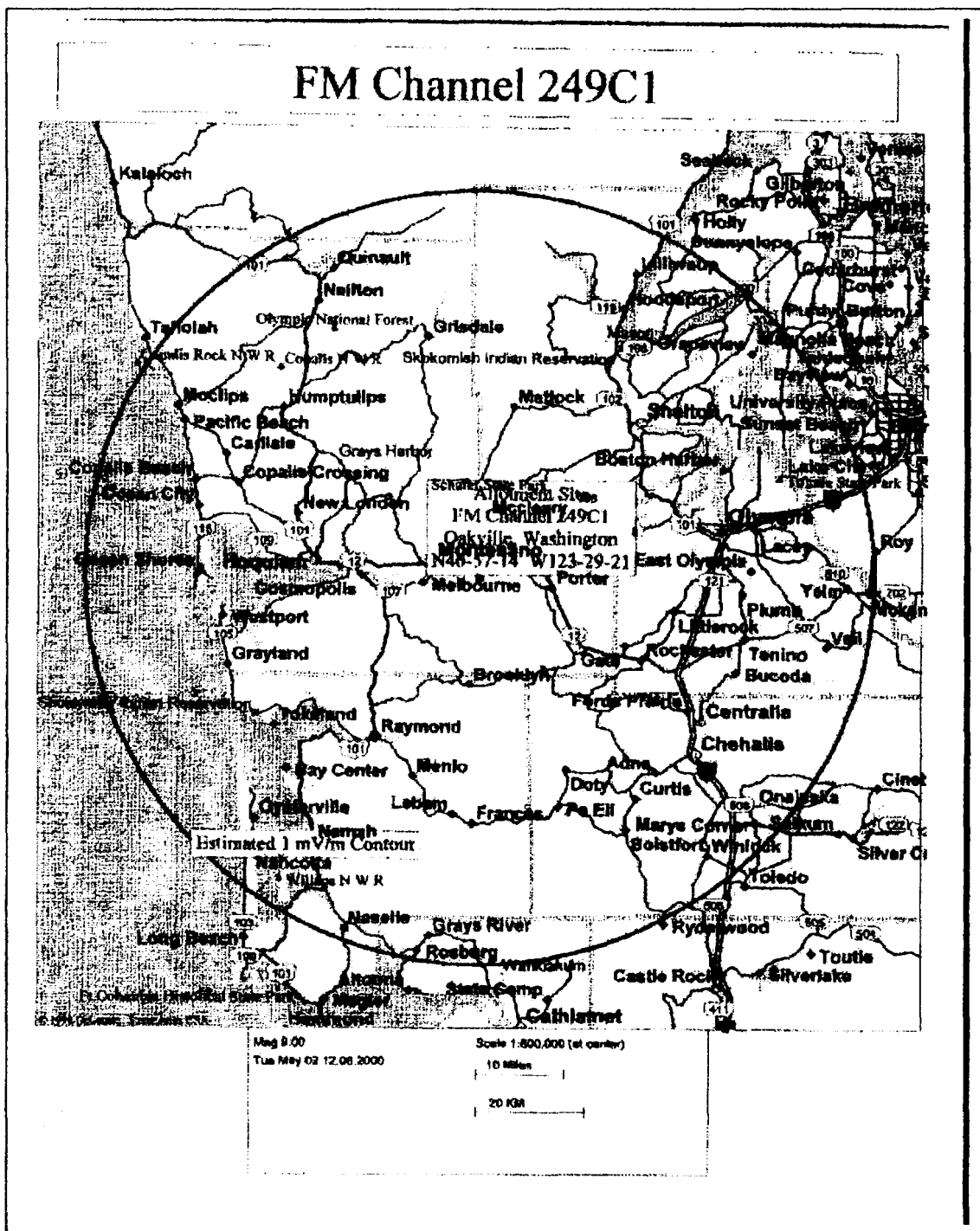
1990 US Census Data
 Database: C90STF1A
 Summary Level: State--County--County Subdivision

Olympia East Division county: FIPS.STATE=53, FIPS.COUNTY90=067,
 FIPS.COUSUB90=92368

PERSONS

Universe: Persons

Total.....18662



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Engineering Statement
Oakville, Raymond, and South Bend, Washington
MM Docket 00-41
May 2000

Exhibit E-2

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Comments in Opposition to Proposed Rulemaking have been served by United States mail, postage prepaid this 3rd day of May, 2000, upon the following:

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